Donald Fox d/b/a Mister Fox Tire Co. *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC. Cases 3-CA-10782 and 3-CA-10898

14 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 26 January 1983 Administrative Law Judge Thomas E. Bracken issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified.

1. The judge found that the Respondent imposed more onerous tasks on employees Bure and Meckes on their return to work from their unlawful terminations in retaliation for their union support, and thereby violated Section 8(a)(3) and (1) of the Act. However, the judge also found that Bure and Meckes were properly reinstated as of 15 February 1982, and that their backpay should be tolled as of that date. The General Counsel contends that the judge erred in so limiting their backpay because Bure and Meckes were not properly reinstated as of that date. We find merit to this exception.

The credited testimony establishes that on 15 February 1982 tire changers Bure and Meckes reported to work pursuant to the Respondent's letter offering them reinstatement to their former positions.[1] General Manager Karnavas told them they were getting their jobs back, but not the same positions. They were then assigned to work in the yard picking up tires covered with snow and ice. When Bure protested that these assignments were not their former positions, Fox, the Respondent's sole owner, said to Bure, "You little punk, I am going to throw you through a wall." Bure and Meckes then went to the yard as instructed. They spent the entire workday in the yard. On the morning of their second day at work, Karnavas assigned them to go out into the yard and cut valve stems off scrap tubes. These tubes were in a big pile covered with snow and ice. Some time after 10:30 a.m. Bure left the shop telling Fox he was going to the Labor Board. Meckes was then assigned to changing tires in the main building. In their prior employment, both men had spent the vast majority of their work hours changing tires indoors. On rare occasions Meckes had worked in the yard, but only for an hour at a time.

The General Counsel contends that the judge erred in limiting the backpay of employees Bure and Meckes to 15 February on grounds that, by finding that the Respondent imposed more onerous working conditions on them, they were not properly reinstated as of that date. With respect to Bure, the General Counsel contends that Bure was never reinstated to his former position because at the time he left the Respondent's employ he was assigned duties which were more onerous than those of his former position. As to Meckes, the General Counsel contends that the question of whether he was returned to his former position was never properly litigated and there was no evidence that he continued to change tires or otherwise performed his former job. We agree that neither Bure nor Meckes was properly reinstated 15 February.

As noted above, Bure's former job as a tire changer required that he spend 95 percent of his time inside the shop changing tires and only 5 percent on other work. On 15 and 16 February 1982 the Employer assigned Bure to the job of unloading tires outdoors in below freezing weather or cutting valve stems from frozen tires. The judge found that by these assignments the Respondent unlawfully imposed more onerous working conditions on Bure. That finding of necessity precludes a finding of proper reinstatement for Bure on 15 or 16 February 1982. Moreover, the evidence clearly demonstrates that Bure was not reinstated to his former or substantially equivalent position. While the letter offering reinstatement proposed "immediate reinstatement to [his] former position" the record clearly indicates that this did not occur. Instead, on both 15 and 16 February Bure was assigned tasks substantially dissimilar to those he previously performed. In fact, there was no evidence that the Respondent had ever previously assigned Bure the tasks that he was then asked to perform. Accordingly, for all of the above reasons, we find that Bure was never properly reinstated to his former position and that his backpay has not been tolled.

Similarly, the record establishes that Meckes, like Bure, was not properly reinstated 15 February both because of the unlawful imposition of onerous working conditions on him and because he was not

[1] The letter offering reinstatement read as follows:

Mister Fox Tire Co. therefore believes that it is appropriate to offer you immediate reinstatement to your former position, at the same level of pay and benefits earlier provided you. Accordingly, please report for work on Monday, 15 February, 1982 at 8:00 a.m.

reinstated to his former position of changing tires. Although he had worked in the yard on two occasions for brief periods before his unlawful discharge, his primary job had always been changing tires indoors. However, unlike Bure, Meckes was assigned to his former tire-changing position in the main building some time after 10:30 a.m. on 16 February 1982. Accordingly, we find that the Meckes was properly reinstated to his former tire changing position some time after 10:30 a.m. on 16 February 1982, and that his backpay was tolled as of then.

2. We agree with the judge's determination that employee Esterbrook was in fact reinstated to substantially equivalent work. In the face of uncontradicted testimony that performing other work, including work in the yard, was not unusual for tire changers, particularly in February and when work was slow, and Esterbrook's own admission that he too had performed other work, we find merit in the judge's conclusion that Esterbrook's spending only 5 minutes at the Respondent's facility, without actually beginning any work, was not sufficient time to determine that the Respondent did not and would not reinstate Esterbrook to his former position.

Further, we agree with the judge's finding that employee Watkins' arrest did not violate Section 8(a)(3) of the Act. Contrary to our dissenting colleague, we defer to the judge's factual finding that Watkins was not singled out by the Respondent's general manager, Karnavas on 15 February. We also agree with the judge's determination that Watkins' threat to Karnavas could not be regarded lightly and that the Respondent therefore established that it would have had Watkins arrested even in the absence of any protected activity.[2]

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

We shall order that the Respondent, having discriminatorily discharged employees J. C. Watkins, Nicholas Broncato Jr., George Eberle, Jeffrey Eberle, Ernest Esterbrook, and Shawn Meckes and having reinstated Watkins, Broncato Jr., George Eberle, Jeffrey Eberle, and Esterbrook as of 15 February 1982 and Meckes as of 16 February 1982, make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of reinstatement, less any net interim earnings, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[3] We shall further order that the Respondent, having discriminatorily discharged David Bure, offer immediate reinstatement to him and make him whole for any loss of earnings he suffered as as a result of his discharge by the Respondent on 28 November 1981 until such time as he is reinstated by the Respondent or obtains other substantially equivalent employment.

We shall further order that the Respondent cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act in view of the widespread misconduct which demonstrated a general disregard for employees' fundamental rights. See *Hickmott Foods*, 242 NLRB 1357 (1979).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Donald Fox d/b/a Mister Fox Tire Co., Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Make J. C. Watkins, Nicholas Broncato Jr., George Eberle, Jeffrey Eberle, Ernest Esterbrook, and Shawn Meckes whole for their lost earnings in the manner set forth in the Amended Remedy."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Offer David Bure immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the Amended Remedy section of this decision."

3. Substitute the attached notice for that of the administrative law judge.

[2] Member Hunter notes that the first amendments to the U.S. Constitution guarantees the right to seek redress from the courts, and that no violation of the Act arises from the exercise of this constitutional right unless the exercise is both unlawfully motivated and is without merit. *Bill Johnson's Restaurants v. NLRB*, 103 S.Ct. 2161 (1983). As found by the judge, employee Watkins threatened the Respondent's general manager Karnavas with bodily harm and smeared grease on his face. As also found by the judge, Watkins was "a powerful figure of a man" and a threat of force could not be lightly regarded. In these circumstances, Member Hunter would find that the Respondent's prosecution of Watkins was not baseless and for this reason cannot be found to violate the Act.

[3] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

MEMBER ZIMMERMAN, dissenting in part.

I join in all of my colleagues' findings except their adoption of the administrative law judge's dismissal of the allegations that employee Ernest Esterbrook was never properly reinstated, and that the Respondent's arrest and discharge of employee J. C. Watkins violated Section 8(a)(3) and (1) of the Act.

The facts with respect to the Esterbrook incidents are simply stated. Pursuant to the Respondent's offer of reinstatement, Esterbrook returned to work on 22 February 1982, at which time he was told by General Manager Karnavas to go to work in the yard and help load tires. Esterbrook protested, asserting that the company letter stated that he was to be put to work in his former position and that he was a tire changer. Karnavas told him that he did not care what the letter said, Esterbrook would work wherever he wanted him to go. Esterbrook said he was not being treated fairly, punched out, and left. Esterbrook stated that he had been at the shop about 5 minutes.

On the basis of the brevity of Esterbrook's presence at the shop, the judge concluded that the General Counsel had failed to establish that he had been subjected to more onerous working conditions. Noting that the Respondent sometimes assigned employees to different jobs for short periods, he concluded that there was insufficient evidence to determine that the Respondent's assignment imposed more onerous working conditions on Esterbrook. However, the determination that more onerous working conditions were not imposed does not warrant the finding that Esterbrook was properly reinstated on 22 February. When Esterbrook complained that he was not being assigned to his former position as promised in the letter offering reinstatement, Karnavas said that he did not care what the letter said and that Esterbrook would work wherever the Respondent wanted him to work. He then assigned Esterbrook to work outdoors in harsh winter conditions unloading trailers, a position he had not previously held with the Respondent. Karnavas' words and actions made it clear that the Respondent was not going to honor its letter offering reinstatement to Esterbrook's former position. Contrary to the majority, 5 minutes on the job was quite sufficient to determine that the Respondent did not, and did not intend to, reinstate Esterbrook to his former position. I would therefore find that Esterbrook was not reinstated on 22 February and that his backpay has not been tolled.

As to the arrest of employee J. C. Watkins, the judge found, and I agree, that the General Counsel made out a prima facie case which supported the inference that his union support was the motivating factor causing the Respondent to have him arrested on 15 February, the date of his return to work after the Respondent's unlawful discharge of him on 25 November 1981. However, the judge further found, applying *Wright Line*, 251 NLRB 1083 (1980), that the Respondent sustained its evidentiary burden by demonstrating that it would have had Watkins arrested even in the absence of his union activity. The General Counsel contends that the judge erred in applying *Wright Line*, supra, to this case and that the case should have been analyzed as a violation of Section 8(a)(1) of the Act. In the alternative, he argues that the Respondent failed to meet its burden under *Wright Line*. For the reasons set forth below, I find, contrary to my colleagues, that the Respondent's arrest of Watkins violated Section 8(a)(3) and (1) of the Act. I further find that Watkins was not reinstated on 15 February and that his backpay should not be tolled.

On 15 February Watkins, on returning to work, was instructed by General Manager Karnavas to fill out a timecard. When told that Watkins was unable to fill it out (Watkins was, as Karnavas knew, illiterate), Karnavas told Watkins to go home if he could not fill out the card. However, Karnavas later filled out the card and assigned Watkins to his old stall changing tires.

At approximatley 11 a.m. that day, Karnavas came over to the general area where Watkins was working and began using profanity and yelling that the tires should be changed faster. Watkins stated in his pretrial affidavit that Karnavas directed his remarks to all the employees who were changing tires in the bay. On direct examination, he testified that Karnavas started yelling at "just him" to "[L]et's go" and that he, Watkins, was "tying things up." Watkins told Karnavas that he was changing tires as fast as he could, and that he could only do one car at a time. Karnavas walked away but then returned. At this point Karnavas shook his finger, which had grease on it, in Watkins' face, touching his nose, and told him to go home. In return Watkins put grease on Karnavas' face and told him, "You don't leave me alone, I'll break my foot in your ass." Karnavas then ran into his office.

Shortly thereafter several policemen arrived and arrested Watkins, after searching him for a knife. Karnavas told the police that Watkins had pulled a knife on him.[1] Watkins denied the allegation. Watkins was arrested and charged with harassment. When he returned to work the next day, he was told he was no longer employed. Watkins was subsequently tried on the charge of harassment, con-

[1] The record and accompanying briefs do not reveal whether a knife was in fact found.

victed, and fined $150. At the time of the hearing in the instant case, Watkins' appeal of the conviction was pending.

Joseph DeBergalis Sr., a police officer, testified that, when he complained to Karnavas about the condition of some tires he brought from the Respondent, Karnavas told him it was discriminatee Jeff Eberle's fault, that he could not fire Eberle because of the Union, and that he wanted DeBergalis to arrest Eberle for damaging the tires. The officer explained that no arrest could be made as this was a civil matter. DeBergalis learned later that the damage was not caused by poor workmanship.

Based on the above evidence, I would find that the General Counsel made out a prima facie case that Watkins' union support was a motivating factor in the Respondent's causing him to be arrested, and that, contrary to the judge's finding, the Respondent did not rebut it.[2]

The evidence shows that the Respondent considered police arrest to be a way of retaliating against employees it could not otherwise discipline because of their union support. While the incident on 15 February may have begun with Karnavas' yelling at employees that they were not changing tires fast enough, Watkins was the only employee who spoke up, telling Karnavas to "go back up front and leave us alone. We are working as fast as we can." At this point Karnavas clearly singled out Watkins; for, although Karnavas began to walk away, he returned, stuck his finger on Watkins' nose, and said, "I'll talk to you any I want to." Undoubtedly, Karnavas was annoyed at this union adherent who had already incurred the Respondent's displeasure by his organizing activities and was now attempting to defend himself and the other employees against Karnavas' profane verbal attack on them. Sticking his finger on Watkins' nose and telling him he would talk to the employees any way he wanted was a highly provocative act by Karnavas. And it produced the desired result. Watkins put grease on Karnavas' face and threatened to kick him if Karnavas did not leave him alone, thus giving the Respondent the opening it sought for the use of police arrest. This view of the events is supported by the evidence that the Respondent harbored such union animus that it discharged seven employees, including Watkins, shortly after they began soliciting support for the Union; unlawfully imposed more onerous working conditions on two of the discriminatees when they returned to work; threatened bodily harm on one of the two as well; and attempted to cause the arrest of another discriminatee for the stated reason that the Respondent could not do anything to him because he was in the Union.

Against this background, I cannot find that the arrest of Watkins on 15 February was simply the result of a legitimate business need to protect supervisors from potential harm. Watkins was a known union adherent of whom the Respondent had once already unlawfully attempted to rid itself. On the morning of Watkins' return to work, he again proved himself a thorn in the Respondent's side by protesting the Respondent's abusive verbal attack on the employees for not working faster. This attack was on all the employees and Watkins spoke up on behalf of all the employees as well as himself. This protected action, in addition to Watkins' past union activity, inspired the Respondent's attempt to get rid of him through use of the police. That the Respondent was successful at provoking Watkins into making a threat does not insulate the Respondent's conduct in this matter. Nor does it establish that the Respondent would have caused Watkins' arrest even in the absence of his protected activity. There is ample evidence that loud, profane screaming and threats in the work area were a common occurrence. In such a setting it is beyond belief that the Respondent would have called the police over an employee's threat to kick a supervisor's "ass"[3] had the Respondent not had some other reason to rid itself of the employee. In these circumstances, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by causing the arrest of Watkins on 15 February. It follows from the unlawful arrest and the subsequent discharge that Watkins was not at any time reinstated by the Respondent and that the backpay in connection with his 27 November 1981 discriminatory discharge was not tolled on 15 February 1982.

[2] The judge relied on the testimony of Watkins as set forth in his affidavit that, on the afternoon of the discharge, Karnavas was shouting at all the employees in the bay to change tires faster, not just Watkins. Noting that there was evidence that Karnavas constantly yelled at his employees, the judge concluded that Karnavas had not for any reason singled out Watkins on the morning of 15 February. While acknowledging that Karnavas did in fact touch Watkins on the nose and Watkins retaliated by putting grease on Karnavas' face, the judge further observed that Watkins' threat could not be regarded lightly as Watkins was a large man. He found that the Respondent therefore had a legitimate business reason to order the arrest of Watkins and that this defeated the General Counsel's case.

[3] I note in this regard that the Respondent itself was not adverse to threatening physical violence, as evidenced by Fox's threat to throw employee Bure through a wall.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, or any other union.

WE WILL NOT threaten you with physical harm because of your support of the Union.

WE WILL NOT threaten you with discharge for assisting the Union or selecting it as your collective-bargaining representative.

WE WILL NOT impose more onerous and rigorous terms and conditions of employment on you because you supported the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole J. C. Watkins, Nicholas Broncato Jr., George Eberle, Jeffrey Eberle, and Ernest Esterbrook for any loss of earnings and other benefits resulting from their discharges on 27 and 28 November 1981, until their reinstatement 15 February 1982, less any net interim earnings, plus interest.

WE WILL make whole Shawn Meckes for any loss of earnings and other benefits resulting from his discharge 28 November 1981, until his reinstatement 16 February 1982, less any net interim earnings, plus interest.

WE WILL offer David Bure immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits resulting from his discharge 28 November 1981 until his reinstatement, less any interim earnings, plus interest.

WE WILL expunge from our files any reference to the discharge of J. C. Watkins, 27 November 1981 and the discharges of David Bure, Nicholas Broncato Jr., George Eberle, Jeffrey Eberle, Ernest Esterbrook, and Shawn Meckes 28 November 1981 and WE WILL notify them that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

DONALD FOX D/B/A MISTER FOX TIRE CO.

DECISION

STATEMENT OF THE CASE

THOMAS E. BRACKEN, Administrative Law Judge. These cases were tried at Buffalo, New York, September 1, 2, and 3, 1982. The original charge in Case 3-CA-10782 was filed by the Union, December 1, 1981,[1] (amended December 16 and January 19, 1982) and the original charge in Case 3-CA-10898 was filed by the Union on February 22, 1982 (amended March 18, 1982). The original complaint was issued on January 21, 1982, and the amended consolidated complaint was issued April 5, 1982.

In substance the complaint alleges that Respondent has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Respondent has answered admitting some facts but denying that it has committed any unfair labor practices.

These cases involve the issues of whether Respondent:

(a) Created an impression of surveillance of union activities among its employees.

(b) Threatened physical harm to an employee because of that employee's union and/or concerted activity.

(c) Impliedly threatened unspecified reprisals if the employees selected the Union as their collective-bargaining representative.

(d) Threatened employees with discharge because they assisted the Union or selected it as their collective-bargaining representative.

(e) Discharged employees for joining, supporting, or assisting the Union or engaging in concerted activities.

(f) Imposed more onerous terms of employment on certain employees by assigning them less agreeable and more arduous work.

(g) Subjected an employee to verbal harassment and caused him to be arrested because he joined, supported, or assisted the Union, or engaged in concerted activities.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Company, I make the following

[1] All dates are in 1981 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

Respondent Donald Fox, an individual proprietor, doing business under the trade name of Mister Fox Tire Co. at its William Street facility in Buffalo, New York, is engaged in the retail sale of new and used tires and is also engaged in the automotive repair business. During the past year Respondent sold and distributed products valued in excess of $500,000 and received goods valued in excess of $50,000 from States of the United States outside the State of New York. The Company admits and I find that it is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The main building of Respondent faces on William Street, and contains in its front portion, an office, customer service area, and customer waiting area, all of which are contiguous to each other.[2] It also contains an area with eight bays, which is the main area used by the tire changers to change tires.

In back of the main building is a warehouse where mechanical repairs are performed on cars, as well as some tire changing. There is also a yard used for the storage of used tires and other related items, as well as for the loading and unloading of trucks.

Fox, the sole owner of the Company, testified that "on a normal day" his business would employ 25 persons. Initially Fox testified "that there are no set jobs" and "no man has a permanent position." Subsequently he testified that there were about 10 to 12 tire changers, 3 mechanics whose jobs were "strictly mechanical," 1 vulcanizer, and 3 to 4 yardmen. The Company also employed two statutory supervisors, Albert Karnavas and Terry Scalice, and several salesmen.

General Manager Karnavas, while testifying vigorously that all employees were used wherever needed, admitted that he had employees whose primary reponsibility was the job of tire changer, and that he had two or three employees whose "regular" job was that of a yardman, and one employee who was a vulcanizer. Yardmen loaded outgoing trucks, unloaded incoming trucks, stocked, and sorted tires and tubes, and kept their area clean.

The seven alleged discriminatees in the instant case were described by Karnavas as having the following primary jobs:

Nicholas Broncato—car tire changer
David L. Bure—truck and car tire changer
George J. Eberle—tire changer
Jeffrey Eberle—car and truck tire changer
Ernest Esterbrook—car tire changer
Shawn Meckes—car tire changer
J.C. Watkins—truck tire changer

Karnavas further testified that the Company had a busy season from the end of September to mid-December, when its employees would be removing the regular tires of customers, and replacing them with snow tires for the coming winter. Fox testified that the flow of business was good all year and exceptionally good in November.

B. *Credibility*

Throughout this case there were testimonial conflicts in the sharpest manner between the testimony of the General Counsel's witnesses and Respondent's witnesses, and in a few instances were difficult to resolve. The former employee witnesses presented by the General Counsel, with one exception, impressed me as sincere, honest, blunt, minimally educated, gas station trained tire changers, telling the truth as best they could recollect it, and letting the chips fall where they would. While these employees had an intense dislike for Respondent's general manager Albert Karnavas, I do not find that it interfered with the truthfulness of their testimony. George Eberle was the exception, with a poor memory and general uncertainty, and I do not find him to be a credible witness.

James Croom Jr., a former employee, although not discharged on November 28, testified in a candid, unemotional, honest, and persuasive manner, and I credit his testimony. The fact that he admitted that he had been found guilty of possession of stolen property does not alter in any manner my finding as to his credibility. It is also to be noted that on the day of the discharges, November 28, Respondent allowed him to work, even though he was late. Joseph DeBergalis Sr., a veteran officer of the Buffalo Police Department, was an impressive and completely credible witness.

Respondent's witnesses, with the exception of Anthony Scalice and Sol B. Schwartz, did not impress me as witnesses in whose testimony I could have confidence as to their accuracy or reliability. Rather, I received the strong impression that they were advocates, artfully trying to furnish answers that helped their cause, rather than trying to state the facts as they actually remembered them. Karnavas was a particularly evasive, garrulous, argumentative, and contradictory witness with a poor memory for dates and events. An example is Karnavas answer when asked what was the variation of the number of yardmen during the year:

> A. A lot of people, in the wintertime, like out in the yard, they said it was too cold and they didn't like the snow and weather and that, and some of them, some of them, too many variations, too; they didn't know what they were doing out there. They were trying to make like they knew, but you had to

[2] On the last day of the hearing, I requested that the counsel for the General Counsel and counsel for Respondent go to Respondent's building and jointly measure various distances in the area, and submit a joint exhibit containing these dimensions. Jt. Exh. 1 was subsequently received into evidence, and sets forth these measurements.

know what you are doing, the holes and cuts and breaks in the tires and that.

Another example was his testimony on September 3, when he was asked on cross-examination if he had heard Fox's testimony, Fox having testified at length on the previous day. To this question, he replied, "I didn't pay no attention to what Mr. Fox was testifying to." This statement by the faithful general manager, who worked 7 days a week for Fox, is incredible, particularly when the General Counsel stated on the record, without contradiction, while Fox was testifying, that Karnavas on two occasions signaled answers to Fox.

Fox was an evasive, contradictory witness. An example is his testimony that he had too many duties to get involved in employee relations. Yet he testified initially that on Saturday morning, November 28, when his employees had not arrived for work, he told Karnavas that "when they come in, to send them home; let's make a clean sweep, get new men." On cross-examination he testified that he told Karnavas to use his own discretion.

Scalice was a sincere, straightforward witness and I generally credit his testimony. I also found that Sol B. Schwartz, the firm's accountant, was an honest and credible witness, but his testimony was irrelevant.

C. *Union Activity*

In mid-October, Jeffrey Eberle[3] injured a finger at work. Employees Bure, Jeff and George Eberle, Esterbrook, Broncato, Watkins, Meckes, James Croom, and Gene Zuliani were not satisfied as to the way it was handled, and on November 16 began discussing the idea of securing a union to represent them. Esterbrook contacted Union Agent John Harrison and arranged a meeting for the employees with union officials for the following Monday at Broncato's house.

On the evening of November 23, all of the employees named above, except J.C. Watkins,[4] met at Broncato's apartment with Harrison and another representative of the Union. Here, the employees signed union authorization cards and planned their strategy to achieve union recognition. The employees present were also given unsigned union cards, and were to secure the signatures of Respondent's other employees during the rest of that week and give the signed cards to Jeff Eberle. Then, on the following Monday, November 30, the union agent was to take the signed cards to Fox, and demand recognition.

During the balance of that week, Respondent discharged the seven alleged discriminatees. In its answer to the complaint, Respondent admitted that it discharged Watkins about November 25 (Wednesday); that it discharged George Eberle, Bure, and Broncato about November 27 (Friday); and that it discharged Jeff Eberle, Meckes, and Esterbrook about November 28 (Saturday).

[3] Jeffrey Eberle will be referred to as Jeff Eberle, and George Joseph Eberle, his brother, as George Eberle.

[4] Watkins was asked by Broncato to attend the meeting, but he did not attend as he was a stranger to Buffalo, having moved there from Mobile, Alabama.

1. The General Counsel's evidence as to employer knowledge of union activity

It is axiomatic that an essential ingredient in finding an 8(a)(3) violation is that the employer had knowledge that the employees were engaging in union activity prior to the discharge of the alleged discriminatees. Fox testified that the first knowledge he had occurred on December 3, when he received a telephone call from a person who identified himself as a union representative. According to Karnavas, the first he knew of union acitivity was when Fox informed him of this call. The General Counsel undertook to establish such knowledge by testimony concerning several incidents, as well as by the small plant doctrine.

a. *The intercom*

Watkins testified that in the area where he worked he saw an "intercom" fastened on the side of the wall, right behind a spin balance machine. He described it as a mike and a speaker, one piece of equipment. Some time before the union meeting of November 23 Bure had shown him how to plug it into the wall, push a button, and he would then hear voices from the office. He had never heard any music come out of it, although he had heard music come out of other speakers around the building, and he never heard it used to call any person.

Watkins testified that on the morning following the union meeting, which he had been unable to attend, he turned the intercom on for the first time. He testified that "I don't know why I fooled with it right then, just resting, nothing to do." At this time he heard Fox and Karnavas talking and that "Fox told Albert that there wasn't going to be no union here as long as there was a Fox Tire." Karvavas then told Fox "he'd take care of it."

Bure testified that he had shown the wall-mounted intercom to Watkins, and had shown him how to operate it. Previously, in October, Jeff Eberle had shown him how to plug it in, press one of approximately five buttons, and then be able to hear sounds from the office. Bure used it about six times, and no music came out of this speaker, although music came out of other speakers throughout the building. He had seen a transmitter for the intercom through which music was piped into the building, but admitted that he had never seen a transmitter for the intercom in Watkins' area.

Jeff Eberle testified that the intercom in Watkins' work area looked approximately 15 years old and was set up like one you would buy at Sears. He had listened over it five or six times, and heard the voices of Fox, Karnavas, and Ciliento, although it was not used by the Company for any business purpose. He had shown it to Bure and told Meckes about it. When asked if he ever determined where the other end of the intercom was located, he replied that it was behind the counter that was near the main entrance of the building. He further testified that it was visible from outside the counter, as it was on one of the walls. When asked if there was more than one intercom unit around this area he testified that "There was a new one that they have now and that little one, the older one, I guess."

On direct examination Fox denied that the Company had an intercom, but testified that it has a radio which normally played music constantly. This music was piped throughout the building to speakers which were in all the bays. If Fox wanted to make an announcement over the speakers, he testified that "you have to take the mike off the hook, press down on it, hold the lever, whatever you call it, down and speak into it." When asked if he could identify the speaker that Watkins testified about he replied:

> A. No, not really; I don't have any other speakers.
>
> Q. Do you know if there is a speaker out there in the shop?
>
> A. Maybe an old one laying there that we don't use, has been there since 1965 in that building, about sixteen eighteen years; and if there is an old one hanging up there, if there was, I have no knowledge.

On cross-examination Fox testified that music was piped over an intercom system by means of a radio that is turned on in the office in the morning. Sound from the radio goes out to approximately eight speakers in the building, which he identified as one in the waiting room, one in the the back room, four in the center room, and one or two in the outside room. When asked if this was a system he installed he replied that it was.

Based on the weight of the evidence and particularly Watkins' demeanor, I credit Watkins', Bure's, and Jeff Eberle's testimony that there was an old intercom mounted on the wall behind the spin balance machine in the bay area where Watkins worked. For the same reason I also credit Watkins' testimony that on the day after the union meeting he heard Fox tell Karnavas that there would be no union at Fox Tire, and that he heard the general manager tell Fox that he would take care of it. Fox himself admitted that there "may be" an old speaker out in the shop, that could have been there since he moved in, apparently in about 1965.

I therefore find that this incident establishes that Respondent had knowledge of the union meeting held on the prior evening. It also establishes the union animus of the Employer.

b. *Croom's testimony*

Croom testified that on the Tuesday after the union meeting he was changing tires in the warehouse when he overheard Karnavas say that he knew there had been a union meeting over at Broncato's house on Monday night. Croom did not see the person that the general manager was talking to, as Karnavas was talking to someone in the doorway.

Croom also testified to an incident that occurred on the Saturday after Thanksgiving. Croom and Bure regularly came into work together as they lived next door to each other. On this date, November 28, Croom and Bure missed the first bus, and had to wait for a second bus. Bure telephoned "Fox" and informed Respondent that he and Croom would be late. Croom reported to the plant about 8:20 to 8:30 a.m., punched his timecard, and went to work, without any comment from the Company. About 11 a.m., Croom was stacking tires on a landing about 10 feet above floor level, when he heard Karnavas talking to an employee he knew as Big Man or Leonard.[5] When asked what was said, Croom testified as follows: "Albert was telling him that, you know, what we do when this starts happening, we start getting rid of them. Once they see people being dropped off, the people start doing."

Croom also testified to an incident that occurred that afternoon, as he was leaning on the cigarette machine, waiting for his ride home. At this time Croom heard Fox talk to an employee whom Croom knew as "Shorty"[6] right in Croom's presence. Croom testified that "Fox told Shorty not to come in for a couple of days because there might be picketing outside because, you know, he fired all these people on Saturday; didn't want no trouble, and didn't want nobody coming in to work." Fox said nothing to Croom about not coming in on Monday.

Croom also testified to a conversation he had with Karnavas on the following day, Sunday, November 29. Croom had previously secured permission from Fox to bring his uncle's truck in on that Sunday, so as to mount tires on it. When asked by the General Counsel what he and the general manager had said to each other, Croom testified:

> A. I was there, spin balancing the last tire or maybe the second to last one, he come up and started talking about Dave Bure about "You got nothing to do with them guys" and "He hangs around with Nick Broncato, so he has got to go."
>
> Q. Did he say the reason he was laid off was because of work habits?
>
> A. He came around and he says, I laid the rest of the people off because the customers' complaints, of tires being loose, customers' complaints of tires going flat, customers coming back there with tires being flat.
>
> Q. What did you say when he told you that?
>
> A. It just didn't make sense to me.
>
> Q. What did you say?
>
> A. I don't recollect.

Croom admitted that in that conversation with Karnavas, the general manager did not indicate that the reason for the termination of the employees on Saturday had anything to do with the Union.

Fox and Karnavas denied generally that these conversations took place.

I credit Croom's testimony as to all four incidents, but I only rely on the incident of November 24 as proving company knowledge of union activity. In this instance, Croom heard Karnavas tell someone that he knew there had been a union meeting at Broncato's house on Monday night. The three other incidents testified to by Croom were too ambiguous to rely on to prove knowledge by Respondent of union activity.

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[5] Karnavas identified this employee to be Leon Martin.

[6] Fox identified Shorty as Milton Harris.

c. *Meckes*

The third witness the General Counsel relied on to prove employer knowledge was Meckes. Meckes testified that on either Tuesday or Wednesday after the union meeting, he was by the coffee machine in the waiting room when he heard Fox talking with Karnavas and Terry Scalice, the sales manager. Meckes placed them behind the desk[7] in the customer service area. He testified that he was on a direct line from where these three persons were standing, but that they could not see him, as there was a wall between them. When asked what he heard, he testified as follows:

> He was calling Nick Broncato a "Scumbag," you know—, stuff like that, and then he said anyone who, he goes, "He is done" and he doesn't want anyone who associates with him around, and the exact words, I think "I want to get rid of anyone who associates with that scumbag."

Meckes estimated that he was 15 to 16 feet from Fox and Albert when they were talking behind the counter, in what he described as a normal tone. On rebuttal Meckes testified that on the evening following his testimony, he had gone to Respondent's building and measured the distance from the counter to the coffee machine. He had used a 20-foot tape as he looked through the building's front glass window as he made his measurements. Meckes testified that the distance was a maximum of 20 feet.

Fox testified that he measured with a tape the distance from the counter to the coffee machine, and that the distance was 45 feet. Joint Exhibit 1 shows that the distance from the counter to the wall that abuts the coffee machine is 34 feet 2 inches. It also shows that the distance from the wall behind the counter to the wall abutting the coffee machine was 44 feet 4 inches. I find Meckes' testimony too unreliable in this instance, and I do not credit him.

d. *Small plant doctrine*

During the course of the hearing the General Counsel presented certain evidence to prove that the facts of this case merit the application of the small plant doctrine. The Board has long held that absent direct knowledge as to Respondent's knowledge of union activity, such knowledge may be inferred from circumstantial evidence, including the size of the plant, the timing of the discharges and the pretextuous reasons asserted for the discharge.[8]

Respondent's total work force at most consisted of only 25 employees, all of whom worked in one contiguous area, where they were closely supervised by Fox and Karnavas. Karnavas, by his own account, often worked shoulder-to-shoulder with the men, as he testified he spent 40 to 50 percent of his time changing tires.

Esterbrook, who worked in the first bay, testified that on Tuesday or Wednesday followig the union meeting he heard George Eberle, Jeff Eberle, and Meckes in that area discussing the union meeting on two occasions. He then told these employees that it would be best if they kept their mouths shut, and all agreed not to "broadcast" anything about the meeting. George Eberle corroborated Esterbrook's testimony. On direct examination, Meckes testified that an employee named Mark Baldwin brought up the subject of the union meeting twice in the vicinity of Karnavas. On cross-examination, when shown his affidavit to the Board, Meckes admitted that when he reported Baldwin's remarks to the Board agent, he had not stated that Karnavas was in the area.

The smallness of the plant, the conversations of the employees in their work area about the union meeting, the constant close supervision, and the timing of the discharges, makes it likely that the Employer observed the union activity, and I so find. *Bill Johnson's Restaurant*, 249 NLRB 155 (1979), enfd. 713 F.2d 1446 (9th Cir. 1982).

D. *The Discharges*

1. J. C. Watkins

Watkins testified that on Tuesday afternoon, November 24, he was in the Company's bathroom, and could hear Fox and Karnavas talking as they stood behind the counter. He could not hear what they were talking about while he was in the bathroom, but when he came out he heard Fox say to the general manager, "What are you going to do with J.C?" Karnavas replied to Fox that he would take care of it.

Watkins did not work on November 25 or 26 as Wednesday was his regular day off, and Thursday was Thanksgiving. On Friday he reported to work at 7:30 a.m. Karnavas, who was standing at the cash register, told Watkins that work was slow and he would call him if he needed him. The general manager then told him to leave his phone number, which Watkins did, and left. About a week later Watkins went back to the facility and talked to Karnavas about his job. Karnavas told him that work was slow, but he would call him when it snowed. When Watkins told the general manager it was snowing now and he needed the work, Karnavas merely said, "I will call you. I got the phone number." During this conversation Karnavas told Watkins that he was a little slow in changing tires. Watkins replied that Karnavas had formerly told him he was a good tire changer, and that he liked the way he changed tires. Karnavas then replied that Watkins was too slow and walked away.

Karnavas testified that he laid Watkins off on Friday, November 27, because business was starting to slow down, "at the time it was just dead," and he had no work to offer him. Since Watkins was the last man hired, he was laid off. Karnavas admitted that he told Watkins that if the Respondent got busy, or if it snowed, he would call Watkins. Karnavas also admitted that Watkins came back about a week later and asked if there was any jobs open, and he told him there was not. Karnavas also

[7] Apparently Meckes was referring to the counter when he said desk, as the counter was constantly referred to by other witnesses.

[8] *Florida Cities Water Co.*, 247 NLRB 755 (1980); *Wiese Plow Welding Co.*, 123 NLRB 616 (1959).

admitted that he had no problem with Watkins' work, and that Watkins was his main truck tire changer.

Karnavas testified that it was decided to lay Watkins off about a week before November 24, as "it started slowing down at that time." When asked why he waited until November 27 to tell Watkins that he was laid off, Karnavas vaguely argued that he did not know if he had been in the shop on November 24.

2. George Eberle and Broncato

George Eberle, who lived with Nick Broncato and Gene Zuliani, testified that he was scheduled to work at 8:30 a.m. on Friday, November 27. The three employees reported about 10 minutes late, and were told to see Karnavas. The general manager proceeded to tell George Eberle and Zuliani to leave as they were through. When Eberle protested that they were only 10 minutes late, Karnavas told them to see Fox. George Eberle's testimony is that he and Broncato went to see Fox, and when given their paychecks, left the building. Later that day George Eberle went back for his personal belongings and was told by Karnavas that he was laid off. He further testified that he did not report for work on the following day, November 28.

Neither Zuliani nor Broncato testified, and George Eberle's testimony is not clear as to whether Zuliani was discharged at the same time they were.

Karnavas originally testified that on Saturday, November 28, George Eberle, Broncato, and Zuliani came in together and were late. He proceeded to tell Broncato and George Eberle that they were fired, but before he could say anything to Zuliani, Zuliani said he quit and left. On the following Monday, Zuliani came in and talked to Fox, and Fox reinstated him that day. When asked on cross-examination if it were not true that George Eberle and Zuliani had come in on Friday with Broncato and that George Eberle had been discharged on Friday, and not on Saturday, Karnavas testified as follows:

> A. No, sir, they worked Friday, because I got the payroll.
>
> Q. Don't give me an explanation. You say it wasn't Friday?
>
> A. It was not Friday. Not to my knowledge. There is a possibility it could have been, but not to my knowledge, at this time.
>
> Q. You acknowledge, though, it is possible that it was Friday that you discharged them?
>
> A. It is possible, but I don't think so; I am not sure.

Fox testified that on November 28 he arrived at the shop between 7:30 and 7:45 a.m. At that time the only persons present were Karnavas, Scalice, and salesman Bernardo Ciliento. Fox asked his general manager how many men had come in to work and was advised that none had. Around 8 a.m., three employees trickled in, out of the 10 or 11 who usually work on Saturday, their busiest day.[9] When it was going on 9 a.m. his friend Nicholas R. Lucci, the owner of Bobby's Restaurant, stopped by. Lucci was there to get a food order for lunch that Fox provided his employees on Saturdays. Fox asked Lucci to see if he could "round up my men." Lucci returned about 15 minutes later and told Fox that he had blown his horn at Broncato's house, and received no response. He then "went up to the house and banged on the door," whereupon Broncato came "downstairs" and told Lucci, "We are all f— up."[10] Following Lucci's statement Fox testified "I told my manager, Albert Karnavas, to do whatever he had to do, when they came in, to send them home; let's make a clean slate, get new man."

Fox's testimony as to what date the seven alleged discriminatees were discharged was more vague than that of Karnavas. On direct examination he stated that all seven were discharged on Saturday. However, on cross-examination, he testified that he believed Karnavas discharged two employees on Friday, three on Saturday, and "on the following, Monday, or something, one or two."

The matter of resolving which day George Eberle and Broncato were discharged is a difficult one, as it involves mostly unreliable witnesses on both sides. George Eberle testified they were discharged on a Friday, November 27. Karnavas and Fox were indecisive and not sure whether the discharges occurred on Friday or Saturday. Lucci was sure it occurred on Saturday. I do not credit Lucci's testimony because of his demeanor, his obvious bias for Respondent, due to his business relationship, and the weight of the evidence. However, I do credit the testimony of Scalice, and find that they were discharged on Saturday, November 28. Scalice remembered that on that Saturday morning he heard Karnavas "telling everybody that they were laid off, or fired." He specifically remembered Broncato coming in that morning, and thought George Eberle came with him. The testimony of Jeff Eberle also supports this date as he told Fox that morning that it seemed to be a coincidence that "everybody" was being fired at the same time.

3. David Bure, Jeffrey Eberle, Ernie Esterbrook, and Shawn Meckes

Bure corroborated Croom's testimony set forth herein in section C, 1, b, above, that he and Croom missed their regular bus on Saturday morning, and that he then telephoned Karnavas telling him they would be 10 to 15 minutes late. Karnavas, without stating any reason, then told Bure he was laid off, but to send Croom in. About

[9] Fox did not identify these employees.

[10] Lucci testified after Fox asked him to "round up my boys," he went to Broncato's apartment, the employee regarded by Lucci as "the leader." When he blew his car's horn about 8:45 a.m., and rang the door bell, he received no answer. He then went up and knocked on the door. When Broncato answered the knock, Lucci asked him why he had not come to work and Broncato replied, "Luch, we have been out all night partying. We are all f— up." Lucci further testified that he could see three men lying on the floor, one of whom he identified as George Eberle. Lucci then went back to the shop and told Fox that he was out of luck, that "the boys aren't coming to work. They looked like they were all drunk." Fox replied to this by stating, "I'm cleaning house right now." Lucci did not take his usual order for 60 or 70 sandwiches, as "there was nobody working," but just brought lunches for Fox and several associates.

10:30 that morning Bure went to the shop and saw Fox and Service Manager Scalice, all of whom were behind the counter. Bure asked Fox several times why he was discharged, and received no answer. Scalice then told Bure that he would tell him in accounting, and the two then entered that office. Scalice then informed Bure he was being fired "because of loose lug nuts and customer complaints of swearing." When Bure asked if anyone had ever pointed him out as leaving lug nuts off, or swearing, the sales manager replied, "No, but it was in your general area." Bure denied that he had ever left loose lug nuts on wheels, or that any customer ever complained that he did, or had any Fox manager ever told him he had done so. In like manner he also denied the swearing allegation.

Bure also testified that when he came into the shop that morning he saw three employees in the main shop bay area changing tires. These employees had not worked at Fox prior to that day. He also saw Croom working on a truck.

Karnavas testified that he did not recall if Bure called him on Saturday, or if Bure came to the shop, and did not recall what day he terminated Bure, although it might have been on Monday. When he did terminate Bure he told him it was "because of so many mess-ups."

Scalice testified that on the Saturday after Thanksgiving, Fox told him to take Bure in the office and tell him why he had been fired. Scalice testified that he knew the employees were fired that day because Fox and Karnavas had told him, between 8 and 10 a.m. that day, that the employees were to be discharged because of customer complaints. The service manager admitted that he told Bure his discharge was because of lug nuts and wheels coming off, and that it was strictly because of criticism from customers. He also told Bure that the customer complaints were directed at all employees who installed tires, and not individually at Bure. Scalice admitted that he did not tell Bure anything about being terminated because he was late for work that morning.

Jeff Eberle testified that he reported to work on Saturday 5 to 10 minutes before starting time. As he walked in, Karnavas was at the front counter and told him that he was fired. When Jeff Eberle asked what were the grounds, the general manager said customer complaints. When Jeff Eberle pressed him as to what customer and when, Karnavas informed Jeff Eberle that he did not have to tell him anything. As Jeff Eberle was walking to his car, he saw Fox and approached him, telling him that it seemed to be a coincidence that everybody was getting fired at the same time. When Fox told Eberle he was not being fired, Jeff Eberle informed him that Karnavas had told him he was fired. Fox then reversed himself, saying "that's right, your name was on the list too."

Karnavas, as usual, was extremely vague, testifying that he did not recall if Jeff Eberle arrived on November 28 or not, and the best he could recall was, he did not. However, he discharged him on November 28 or 30, and to Jeff Eberle's questions as to why he was discharged, replied:

> I told him there was too many, there was all one clique, and Nick and all of them, Nick and all, one clique that was on the other side, and "All you guys are messing up, leaving lug nuts loose, messing customers' cars up, and you are not working as a team." I says, "I try to get people to work as a team. You work against each other."

Esterbrook testified that he reported for work on Saturday morning at approximately 10 minutes before 8 a.m. He walked through the main door, heading for the timeclock, when Karnavas told him not to bother to punch in, as he was through. When Esterbrook asked why, the general manager told him that there were complaints that he was not fixing tires properly. When he asked who complained, Karnavas answered that the complaints were not only against him, but against "the whole crew out there."

According to Karnavas, Esterbrook was not at work on November 28 at 8 a.m. However, he testified that he terminated Esterbrook, but he did not tell Esterbrook that he was terminated, as Fox and Scalice did so. When Esterbrook wanted an explanation of why he was let go, Scalice took Esterbrook in the inner office and explained this to him.[11]

Meckes testified that he reported for work November 28 at approximately 20 minutes before 8 a.m. He was having a cup of coffee when Karnavas told him not to bother to punch in, as he was "done." When Meckes asked for a reason, the general manager told him that it was because of complaints from customers about loose lug nuts. When Meckes defended himself by stating that he had worked there for a year and never had one complaint, Karnavas replied that the complaints were not just about him, but "almost everyone back there." Meckes testified that no management personnel ever told him that customers had complained about his work, nor had anyone from management ever told him that he left loose lug nuts on tires.

Karnavas testified at first, that Meckes did not show up on Saturday, and then admitted that he really did not remember if he saw Meckes that day or not. However, he admitted that he told Meckes he was discharged, but did not remember anything about the conversation, and did not remember if he discharged him on Saturday or Monday.

I credit Jeff Eberle's, Esterbrook's, and Meckes' testimony that they arrived on time on the morning of November 28, and that Bure called in stating he and Croom would be late. I do not credit Scalice's statement that by 8 a.m. nobody showed, although I have credited other testimony by Scalice. However, as stated by Judge Leonard Hand, "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (1950). Karnavas himself testified that three tire changers had shown up by 8 a.m. and Fox admitted that around 8 a.m. three employees had come in.

[11] As set forth previously, Scalice testified that he took Bure in the office and told him why he was discharged. I credit Scalice's and Bure's testimony that it was Bure who received the explanation, not Esterbrook.

4. Discussion and conclusions

In applying the teachings of *Wright Line*, 251 NLRB 1083 (1980), I find that General Counsel has sustained his burden of establishing a prima facie case that the employees' union activities motivated Respondent's decision to discharge them.

Respondent knew that the employees had a union meeting on the evening of November 23 at Broncato's house, as Karnavas made this very statement in the shop on the following day. Fox himself clearly showed his strong union animus when on the same day he told Karnavas that there would never be a union at Fox Tire.

The record is uncontested that the discharge occurred in the middle of Respondent's busy season, and in fact, as described by Fox, when business was exceptionally good. It is also evident that these employees were competent tire changers, as three of the seven discriminatees received raises in their hourly rate of pay in the month prior to their discharge,[12] and a fourth employee, George Eberle, received a 25-cent raise in the fall. Since neither Broncato nor Zuliani testified, the record does not show whether they received a raise or not. Watkins, the seventh discriminatee, had only been hired in October and the record is silent as to any pay raise to him. However, Karnavas himself testified that Watkins was "a good truck tire man."

Yet, despite it being Respondent's busy season, these experienced, competent tire changers were terminated without any warning or notice. I therefore conclude that a motivating factor in Respondent's decision to discharge these seven employees was its anger over their support for the Union.

I turn now to the reasons offered by Respondent for the discharges of these employees, to rebut the General Counsel's case.

a. *Watkins*

Respondent's position is that business was starting to slow down, and it simply laid Watkins off because he was the most junior man. I do not find that Respondent's stated reason for Watkins' layoff stands scrutiny. Although Karnavas testified that in November business was slow, in fact, that it was "just dead," so that he had to lay off Watkins, Respondent produced absolutely no records to support this contention. Certainly this at least 16-year old company, which retained an outside accounting firm, would have various financial records, such as annual statements, profit-and-loss statements, and tax records to substantiate the oral statements of Karnavas that business was slow, in fact dead. The failure of Respondent to submit such documentary evidence causes me to believe that its financial records would not have supported its claim that business was slow.[13] It is also noteworthy, as testified to by Fox, that Karnavas never told him that business was slow in November. If business had been slow, it is inconceivable that Karnavas would not have reported this to Fox.

Finally, I find it incredible that the general manager decided to lay Watkins off a week before November 24, and did not do so until November 27, a period of approximately 10 days. Watkins was the same capable truck tire changer after November 24, as he was before that date. The only difference was that in the week before November 24, Respondent did not know that the employees were engaging in union activity. Having learned in the week of November 24 of such activity, Respondent determined to get rid of the "clique" in the main shop.

Respondent's insistence that Watkins was only laid off for lack of work is further undermined by its refusal to hire him back when he returned to the shop in the week following his layoff. It was snowing at the time, a condition which causes Respondent to be at its busiest peak in changing tires, and six other tire changers had been discharged in the past few days. Yet, Respondent refused to rehire this good truck tire changer, who, according to the general manager, had only been laid off for lack of work.

b. *Bure, Jeff Eberle, Esterbrook, and Meckes*

Respondent in its brief argues that the above-named four employees were discharged because they failed to report at their scheduled times, and therefore there was a sufficient justification for their discharge. I do not find that these employees were discharged for not reporting on time, and I further find that at no time were they given this reason for their discharge.

The record is clear that on the day these employees were discharged they were told by Karnavas and Scalice that it was because of customer complaints about loose lug nuts, and for not fixing tires properly. The record is also clear that Karnavas did not tell any of these employees that he was being fired because he was late for work. Respondent sought to prove that there had been specific customer complaints through the general manager. Karnavas testified to some specific complaints of customers directed at Bure, the two Eberles, and Meckes, which he contended occurred in the fall or in November. I do not credit Karnavas because he was such an absolutely incredible witness and because of Respondent's failure to produce records to support these charges. *Capreccios Restaurant, Calip Dairies, Inc.*, supra. The general manager related no customer complaints as to Broncato or Esterbrook.

Fox's testimony was also explicit that it was customer's complaints that led to his decision to let them "all" go. He testified that the complaints started 6 to 8 months prior to November. He admitted he was unable to pinpoint who did the work complained of, and that he could not relate any specific incident involving anyone of the discharged employees. It is to be noted that four of the discharged employees, George Eberle, Bure, Esterbrook, and Watkins were hired at the most 3 months prior to November. Therefore, they were not even on

[12] Jeff Eberle, $1, Esterbrook, 25 cents; and Meckes, $1.25.

[13] If evidence, such as business records, is within the party's particular knowledge and control, and such evidence would strengthen the party's case if offered into evidence, that party is expected to introduce such evidence. The failure of the party to introduce such evidence raises an adverse inference. *Capreccios Restaurant*, 249 NLRB 685 (1980); *Calip Dairies, Inc.*, 204 NLRB 257 (1973).

the payroll when the customer complaints alluded to by Fox started, and were not on the payroll for at least half of the period in which Fox contends he received complaints from customers. Thus, when the record as to customer complaints is reviewed, it is disclosed to be too weak a reed for Respondent to rely on.

During the hearing Fox testified as to an additional reason as to why he fired the six employees. He testified that the straw that broke the camel's back in his decision to discharge these employees was that they did not show up on November 28. I do not credit this testimony as I find it to be an afterthought. Not once in his 2 hours' of conversation with Scalice that morning did he say anything about the employees being discharged because they were late.

I have already credited Jeff Eberle's, Esterbrook's, and Meckes' testimony that they arrived on time on the morning of November 28. I have also credited Bure's testimony that he called Karnavas in the morning and told him that he and Croom would be a little late. The fact that the general manager instructed Croom to come in to work, even though he would be late, is discussed in section c. below.[14]

c. *George Eberle and Broncato*

As to George Eberle and Broncato's discharges, Respondent also contends that it discharged them because they arrived late for work. However, neither the president nor the general manager knew whether their discharges took place on Friday, November 27, or on Saturday, November 28. I have found that they were discharged on Saturday, and undoubtedly they were late, as George Eberle admitted they were about 10 minutes late. However, it was no unusual thing for Respondent's tire changers to be late, as Karnavas admitted that the employees usually "show after eight or at least by nine o'clock."

It is also to be noted that Zuliani was with George Eberle and Broncato, and was late the same amount of time that they were late. Yet, on the following Monday, Fox allowed him to go to work. Of equal significance is the fact that another late comer that morning, Croom, was not discharged, but was allowed to work. The fact that Zuliani and Croom were permitted to work certainly belies Fox's instructions to Karnavas to make a clean sweep of all who were late, and get new men.

The reason Croom and Zuliani were allowed to work while the other seven employees were discharged can be explained by examining the nine employees' respective work locations. Croom and Zuliani worked in the warehouse whereas the seven discharged employees all worked in the main shop. It was the employees in the main shop that Respondent had centered on as the "clique" that was trying to secure union representation for its employees.

From the foregoing I conclude that Respondent's stated reasons for the discharges of the seven employees were pretexts, and that Respondent sought to disguise the true motive. When the asserted reasons are not reasonable as I have so found herein, then that fact is evidence that the true motive for the discharges is an unlawful one, which Respondent seeks to disguise. See *Shattuck Denn Mining Corp. (Iron King Branch) v. NLRB*, 362 F.2d 466 (9th Cir. 1966); *First National Bank of Pueblo*, 240 NLRB 184 (1979).

Finding that the alleged reasons for the seven employees' discharges were false and considering the timing and lack of any warning, I infer that the true motive for terminating these seven employees was because they were seeking union representation, which Respondent sought to nip in the bud. By eliminating this clique of employees, Respondent sought to excise the union supporters, and to teach a lesson to the other employees as to the power of the Company over their jobs. Accordingly, I conclude that Respondent, by terminating J. C. Watkins on November 27, 1981, and by terminating David Bure, Jeffrey Eberle, Ernest Esterbrook, Shawn Meckes, George J. Eberle, and Nicholas Broncato Jr. on November 28, 1981, violated Section 8(a)(3) of the Act. *Webb's Industrial Plant Service*, 260 NLRB 933 (1982); *Brooks Cameras*, 250 NLRB 820 (1980), enfd. as modified 691 F.2d 912 (9th Cir. 1982).

E. *The Return to Work and the Imposition of More Onerous Conditions of Employment*

1. February 15, 1982

On advice of counsel, Respondent mailed letters dated February 5, 1982, to each of the discharged employees concerning an offer of return to work. While strongly denying any illegal conduct on its part, it stated that a Board hearing on the charges would not be held for months. The letter further stated:

> Mister Fox Tire Co. therefore believes that it is appropriate to offer you immediate reinstatement to your former position, at the same level of pay and benefits earlier provided you. Accordingly, please report for work on Monday, February 15, 1982 at 8:00 o'clock a.m.[15]

Promptly on the morning of February 15, Bure, George and Jeff Eberle, Meckes, and Watkins reported for work. Karnavas and Fox were present. Bure testified that Karnavas told the employees they were getting their jobs back, but not the same positions. The general manager then told Bure that he and Meckes would be in the yard, that the two Eberles would work in the other building, and Watkins for the truckdrivers. Bure then protested that these assignments were not what the letter had said, as Respondent knew these were not the same jobs as they previously had.

At this point Fox broke in and said to Bure, "You little punk, I am going to throw you through a wall."

[14] I recognize that Croom was present at the union meeting on November 21 at Broncato's house, and yet he was not discharged. However, it is well settled that an employer need not discriminate against all union supporters before the General Counsel can establish discriminatory intent. *Challenge-Cook Bros. of Ohio*, 153 NLRB 92, 99 (1965), enfd. in relevant part 374 F.2d 147 (6th Cir. 1967); *Ballard Motors*, 179 NLRB 300, 307 fn. 26 (1969); *Virginia Electric & Power Co.*, 260 NLRB 408 (1982).

[15] The letter was received by six of the seven employees. Broncato's was unclaimed.

Karnavas then gave the employees timecards to fill out, and Fox called Bure and Meckes "sewer rats." Karnavas then told Bure and Meckes to go to the yard. There, Karnavas told them to pick up tires, which were covered with snow and ice, load them in a truck, and take them to the vulcanizing room. After delivering one load the vulcanizer told Bure that these tires were wet and he could not work on wet tires. Upon telling Karnavas what the vulcanizer said, the general manager told them to go to a trailer and take dry tires out for the vulcanizer. To get to the tires, the employees had to climb over a snow pile. Both employees did as Karnavas directed. After they filled the vulcanizer's storage room with tires, Karnavas sent them to sort tires in a box car, which they did until about 1:30 p.m. At this time Karnavas took Bure, Meckes, and a yardman to another building to load tires until quitting time.

On the following morning, a cold and snowy day, without explanation, Karnavas told the two employees to go out in the yard, and cut valve stems off of scrap tubes. These tubes were in a big pile covered with snow and ice. Bure used the hunting knife he had in his truck to cut the valve stems out of the tubes. Some time after 10:30 a.m. Bure left the premises, telling Fox he was going to the Labor Board.

Bure testified without contradiction that in his prior employment with Respondent he spent 95 percent of his time changing tires in the shop, and 5 percent on other work. He had never before been told to load tires in a truck for the vulcanizing room, and he had never been asked to cut valve stems off of tires.

Meckes corroborated Bure's testimony. He also recalled that after Bure protested that they were not being returned to their regular job, Fox told him to shut up or "I'll throw you through the wall." After Bure left on the second morning Meckes was assigned to changing tires in the main building. About 3 weeks to a month later all the scrap tubes were loaded in a trailer and shipped out. He estimated that there were 100,000 tubes in the pile he and Bure worked on, and that they had cut out 100 to 150 valve stems.

Meckes further testified that from the time he was hired in January 1981 he had been asked to load tires out in the yard on two occasions, each of which took 1 hour. On one occasion he had asked to work in the yard as it was a nice summer day. Several times Karnavas had told him to work in the yard and each time he had said he would not, as that was not what he was hired for. On only one occasion Karnavas told him it was the yard or go home. However, Fox had stepped in and directed that he stay in the bays. This testimony was uncontradicted.

Karnavas testified that on the morning of February 15, the Company already had 10 to 12 tire changers, and therefore he could not put these returning employees in their same job assignment. Fox told him to do what he had to do with them, and it was obvious to Karnavas that the owner was not happy to see them coming back to work. Karnavas admitted that when the five employees reported, he told them, "I have to take you people back, I have no room on your present jobs. I am going to make room for you to work." Karnavas further admitted that he assigned Bure and Meckes to the yard to load and unload trucks all day. He did not testify as to the Tuesday assignment of cutting the valve stems out of the tubes.

Fox testified that he was standing by the counter when the five employees reported on February 15, and that Karnavas spoke to them about their duties. He denied generally that he threatened anybody, and in particular denied that he told Bure he would throw him through the wall. As to the scrap tubes, Fox testified that he had an order from a Mississippi mill for scrap tubes which required that the valve stems be removed. Another order came in for the tubes without removing the valve stems, so he shipped all the scrap tubes to the Canadian customer.

I find that the record sustains the allegation in the complaint that Respondent imposed more onerous and rigorous terms and conditions of employment on Bure and Meckes. The primary job of all the discharged employees was that of a tire changer, work which occupied 95 percent of their time. It is self-evident that performing this semiskilled job in a shop building was less onerous than working out in the open yard on snow covered ground loading tires into trucks, or sorting tires in box cars, or cutting valve stems out of used tubes out in bad weather, as Bure and Meckes were required to do for a day and a quarter.

It was Bure who had acted as spokesman on the employees' return to work, and it was Bure who protested that they were not being returned to their regular jobs. I find that these more onerous tasks were imposed on two Union supporters in retaliation for their union support, and that Respondent thereby violated Section 8(a)(3) and (1) of the Act. *Association of Apartment Owners*, 255 NLRB 127 (1981); *Cutting Inc.*, 255 NLRB 534 (1981).

As to Jeff and George Eberle, I do not find that more onerous duties were imposed on them by assigning them the job of straightening up tires in the warehouse. Jeff Eberle admitted that he formerly loaded tires on trucks about 5 percent of the time. He also admitted that when work was slow, and it was in February, tire changers would "work out in the yard and do other things." Jeff Eberle worked less than 1 day at the job of straightening out tires, in a closed building, and he was then assigned to and worked as a tire changer for the rest of his employment by Respondent. As George Eberle testified, he regularly worked more frequently in the yard than the other employees in the main shop. His testimony does not disclose that he considered his assignment by Karnavas to entail more onerous duties. Accordingly, I shall recommend that the allegation of the complaint be dismissed as to the Eberle brothers.

2. February 25, 1982

Esterbrook testified that, after he received his letter from the Company, he was ill on February 15, and so notified Karnavas. He was told to come in on the following Monday, and he did so. After he reported, he went to the bay in which he had formerly worked. Here he saw an old employee he had formerly worked with, Mack, and two new employees. Karnavas then told him

to go to the yard and help load. Esterbrook protested, stating that the company letter had stated he would be put in his former position, and that he had been a tire changer. Karnavas then told him he did not care what the letter said, that Esterbrook would work wherever he wanted him to go. Esterbrook then told them he was not being treated fairly and punched out and left. He estimated that he had been there 5 minutes. He further testified that he never worked in the yards loading trailers. He admitted that when business was slow he had gone to the yard to get used tubes, which he would bring inside. He would then pump these tubes up and check them to see if they were saleable.

Karnavas admitted that he had assigned Esterbrook to the yard, as he had no openings in the bay area. I do not find that the General Counsel has proven this allegation of the complaint as to Esterbrook, as the 5 minutes Esterbrook spent there that morning was not a reasonable amount of time in which to make such a determination. Meckes had been returned to his job of tire changer after 1 and a quarter days of other work. Jeff Eberle had been returned after seven-eighths of a day. By leaving so precipitately, there is no telling whether Esterbrook would have been required to load for an hour, a half day, or any other amount of time, including no loading at all. Accordingly, this allegation fails for want of proof, and I shall recommend that it be dismissed.

F. *The Harassment and Arrest of J. C. Watkins*

Subparagraph d of VII herein alleges that on February 15, 1982, Respondent subjected Watkins to verbal harassment and caused him to be arrested by the Buffalo Police Department.

Watkins testified that when he reported for work on February 15 Karnavas gave him a timecard to fill out. When he told Karnavas that he could not fill it out, Karnavas then told him to go home if he could not do so.[16] Karnavas then filled it out and assigned Watkins to his old stall. After sorting rims that morning, he started changing tires.

On direct testimony Watkins testified that around 11 a.m., with the place full of customers, Karnavas came over, and with much profanity, started yelling at "just me" to "Let's go," and that he was tying things up. Watkins told the general manager he was changing tires as fast as he could, and that he could only do one car at a time. After further conversation, Karnavas started to walk away but then returned. Watkins then described the ensuing events as follows:

> A. This is when he shook his finger in my face.
> Q. What did he do?
> A. Touch my nose. He told me to go home. When he touch me on my nose, that is what made me angry.
> Q. When he touched you, did he have grease on his hands?
> A. Yes, he had grease on his hands.
> Q. What did you do?
> A. I put grease on his face.
> Q. What did you do?
> A. I told him "You don't leave me alone, I'll break my foot in your ass", that is what I said.
> Q. What did he do at that time?
> A. He ran in the office.

Watkins continued working until 4 or 5 minutes later when the policemen arrived and arrested him, after searching him for a knife. Karnavas had told the police that Watkins had pulled a knife on him, and Watkins protested that he did not have a knife. Watkins was taken by the police to a Buffalo police station where he was charged with harassment. When he returned to work the next morning he was told that he was no longer employed by Respondent. Watkins further testified that he did not hit or push Karnavas.

On cross-examination Watkins denied that Karnavas was yelling at everybody. Watkins then admitted that on March 18, 1982, he had given an affidavit to the Board, which in part read as follows:

> At about 12:45 p.m., Karnavas came over to me and started a conversation. Karnavas was cursing and hollering. He told me and the other employees to get to work and get the tires done. Karnavas was yelling a total of 15 minutes. I said "Why don't you go back up front and leave us alone. We are working as fast as we can." I turned away. Karnavas continued to yell and curse. He came up behind me and I turned to him. He put his finger on my nose and said "I'll talk to you anyway I want to." I said "If you don't leave me alone, I'll break my foot off on your rump." Karnavas then left.

When pressed on just who Karnavas was yelling at, Watkins stated that he was yelling at "mostly me."

Watkins was subsequently tried on the charge of harassment,[17] and he was convicted and fined $150. At the time of the hearing the case was on appeal. Watkins did not file any criminal charge against Karnavas for touching his nose.

Watkins' testimony is uncontradicted as neither Karnavas nor Fox testified as to this incident.

Jospeh DeBergalis Sr., a veteran officer on the Buffalo Police Department, was called to testify by the General Counsel. In the spring of 1982, DeBergalis had gone to Respondent's shop to purchase some tires and have them mounted on rims for a 1953 tractor he owned. When DeBergalis went to pick up his tires and rims he noticed that as Jeff Eberle rolled them out to him they were not sealed and he immediately complained. After Eberle told him that his rims were "shot," the officer went to Karnavas and asked what happened to his rims. Karnavas told him it was the employee's fault and called Jeff Eberle to

[16] Watkins was illiterate and could only write his name. Karnavas knew this from his prior employment.

[17] The General Counsel in his brief states that Watkins was found guilty of violating sec. 240.25 of the New York State Penal Code which provides that "a person is guilty of harassment when with intent to harass, annoy or alarm another person, he strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same."

the front. Here the general manager and Eberle yelled back and forth at each other, as to whose fault it was.[18]

Karnavas told DeBergalis that "Because of the Union, we can't fire him," and kept telling the officer to arrest him for damaging the rims. The officer tried to explain to Karnavas and Fox that no arrest could be made as this was a civil matter. It is the General Counsel's position, as stated in his brief, that this incident with Officer DeBergalis "demonstrated that Karnavas and Fox thought that the approach to take with employees was to have them arrested in order to retaliate for their Union activity."

I find from the record in this case that the General Counsel has made out a prima facie case, as set forth previously, which supports an inference that Watkins' Union support was a motivating factor in Respondent's causing him to be arrested.

However, I also find that Respondent has sustained its evidentiary burden under the *Wright Line* causation test of demonstrating that it would have had Watkins arrested even in the absence of his union activity. Spread throughout the record is ample evidence that Karnavas was a loud, profane, foul mouth screamer, who constantly yelled and hollered at his employees. I have credited Watkins' testimony, as set forth in his affidavit, that on the afternoon involved Karnavas was hollering at all the employees in the bay to get the tires changed faster, and not just at Watkins. The general manager therefore had not singled Watkins out to pick a fight. While Karnavas did touch Watkins on his nose, Watkins did in turn forcefully retaliate by putting grease on the general manager's face, and threatened to break his foot off in his buttocks. Watkins was a powerful figure of a man, as he weighed 295 pounds, and a threat of force by him could not be regarded lightly.

Thus, I find that Respondent did have a legitimate business reason to order the arrest of Watkins. The General Counsel failed to carry his burden of proof and thus I find that the complaint must be dismissed as to this alleged 8(a)(3) violation.

G. *Interference, Restraint, and Coercion*

The complaint alleges four specific incidents of violation of Section 8(a)(1). The evidence in respect thereto will be discussed below in the order pleaded in section VI of the complaint.

Subparagraph a. alleges: "On or about the last week of November 1981, at its facility Respondent, acting through Albert Karnavas, created the impression among its employees that their union activities were under surveillance." In support of this allegation is Croom's testimony that on November 24 he overheard Karnavas tell someone that he knew that there had been a union meeting at Broncato's house on Monday night. Croom did not see the person Karnavas was talking to and did not testify that he knew the person to whom the general manager was talking.

I do not find that Karnavas' statement amounts to an unlawful impression of surveillance. Croom did not know if Karnavas was talking to another supervisor, a customer, or a stranger, and nothing in the record indicates that it was meant for employees' ears. Also, I fail to see how employees would reasonably assume from this statement that their union activities had been placed under surveillance. Accordingly, I shall recommend that the allegation of the complaint be dismissed.

Subparagraph b. recites: "On or about February 15, 1982, at its facility, Respondent, acting through Donald Fox, threatened physical harm to an employee because of that employee's Union activity and/or protected concerted activity." As set forth in section E above, when the employees returned to work on February 15, Bure was the spokesman in stating the employees' protest to the job assignments being made by Karnavas. Although Fox admitted he was at the counter when the employees returned to work, he denied that he had any words for these employees and denied that he threatened anyone. I do not credit Fox, and I credit Bure's testimony and find that Fox did call him a little punk, and stated he was going to throw him through a wall. As admitted by Karnavas, Fox was angry about having to take the employees back to work. The owner obviously resented this young, small[19] tire changer, that he referred to as a little punk and a sewer rat, telling him that the Company's assignments were wrong. Accordingly, I find that the threat by Fox was clearly coercive and the Company thereby violated Section 8(a)(1) of the Act.

Subparagraph c alleges: "On or about February 25, 1982, at its facility, Respondent, acting through Donald Fox, made an inplied threat of unspecified reprisals if the employees choose the Union as their exclusive collective-bargaining representative." In support of this allegation Meckes testified that about a week after his return to work, another employee, Washburn, bent a rim. Meckes described the ensuing events ns follows:

> A. Well, there was a, you know, big major disaster, when the rim bent. You know, it happens all the time, accidents happen, you know, rims bend. First Albert started yelling about it and stuff, and then Mr. Fox came out and started talking to me about it, like I was responsible for it. I says "Don't blame me. I didn't do it," you know, "I had nothing to do with the rim." He started to say, "You guys are f— ruining me. You guys are f— ruining me." He walked to the other side. Turned around and "You guys are f— ruining me with this f— union shit." He shut up right away and just walked away.

Jeff Eberle also testified vaguely about arguments over the same bent rim, recalling that Fox came to the boys swearing that "You guys ruin one more thing and you're gone." Subsequently the General Counsel refreshed his recollection by showing him his affidavit dated March 30, 1982. After reading it Eberle testified that after Fox made his statement about "you guys are ruining me,"

[18] The officer learned later that the rims were very old and had been rusted internally when he brought them in, so that the damage was not caused by poor workmanship.

[19] Bure was 21 years of age, 5 feet 9 inches, and weighed 130 pounds. Fox was 5 feet 10 inches tall and weighed 210 pounds.

Fox also said, "You guys think you are going to get a union in." Fox did not deny making this statement.

Although I credit Meckes' and Jeff Eberle's testimony, I find Fox's statement too ambiguous to constitute an implied threat of reprisal if the employees chose the Union as their bargaining representative. I shall therefore recommend that this allegation of the complaint be dismissed.

Subparagraph d. recites: "On or about February 25 and 26, 1982, at its facility, Respondent, acting through Albert Karnavas, threatened that employees would be discharged if they assisted the Union or selected it as their collective-bargaining representative." In support of this allegation Meckes testified that within a day of the incident involving the bent rim, Karnavas came out yelling at everyone. He was talking about customers' complaints, and Meckes told him that while Karnavas was always talking about customers' complaints he never saw any customers complain. With that, Karnavas replied, "You want to fool around with the Union thing," he goes, "One slip up and you are through." This testimony of Meckes was not contradicted, and I credit it. I find this statement of the general manager to be clearly coercive as he warned Meckes that if he kept up his interest in the Union, and made a single error in his work, he would be discharged. Obviously, the other side of the coin was, if the employee would renounce the Union, he would not be fired for making an error. I find that Karnavas' remark constitutes a violation of Section 8(a)(1).

CONCLUSIONS OF LAW

1. Donald Fox d/b/a Mister Fox Tire Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating J. C. Watkins on November 27, 1981, and David Bure, Nicholas Broncato Jr., George Eberle, Jeffrey Eberle, Ernest Esterbrook, and Shawn Meckes on November 28, 1981, because of their support for the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. By imposing more onerous conditions of employment on David Bure and Shawn Meckes on February 15 and 16, 1982, because of their support of the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By threatening David Bure with physical harm because of his support for the Union, Respondent interferred with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

6. By threatening employees with discharge, if they assisted the Union, Respondent has violated Section 8(a)(1) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having discriminatorily discharged J. C. Watkins, David Bure, Nicholas Broncato Jr., George Eberle, Jeffrey Eberle, Ernest Esterbrook, and Shawn Meckes, and having reinstated them as of February 15, 1982, I find it necessary to order it to make them whole for lost earnings and other benefits, computed on a quarterly basis from date of discharge to date of reinstatement, less any net interim earnings, in accordance with *F. W. Woolworth*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). As Respondent has engaged in such widespread misconduct as to demonstrate a general disregard for the employees' fundamental rights, I find it necessary to issue a Board Order requiring Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Food*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

Respondent Donald Fox d/b/a Mister Fox Tire Co., Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, or any other union.

(b) Threatening its employees with physical harm because of their support for the Union, or any other union.

(c) Threatening its employees with discharge if they assisted the Union or selected it as their collective-bargaining representative.

(d) Imposing more onerous and rigorous terms and conditions of employment on its employees because they supported the Union.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Make J. C. Watkins, David Bure, Nicholas Broncato Jr., George Eberle, Jeffrey Eberle, Ernest Esterbrook, and Shawn Meckes whole for their lost earnings in the manner set forth in the remedy.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from its files any reference to the discharges of J. C. Watkins on November 27, 1982, and of David Bure, Nicholas Broncato Jr., George Eberle, Jef-

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

frey Eberle, Ernest Esterbrook, and Shawn Meckes on November 28, 1982, and notify them in writing that this has been done, and that evidence of such unlawful discharge will not be used as a basis for future personnel actions against them.

(d) Post at its shop in Buffalo, New York, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[21] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."